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IN THE

Supreme Court of the United States

October Term, 1960.

No. 484.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

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November 18, 1960.

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No. 484.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

Radio Corporation of America and National Broadcasting Company, Inc., pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the decision of the district court, denying the motion by Westinghouse Broadcasting Company, Inc. for leave to intervene, be affirmed or that, in the alternative, the appeal by Westinghouse Broadcasting Company, Inc. from the decision of the district court be dismissed.

STATEMENT.

On December 4, 1956, the United States filed a civil antitrust suit against Radio Corporation of America ("RCA") and National Broadcasting Company, Inc. ("NBC") alleging a conspiracy involving the use of NBC network affiliation as a means of acquiring VHF television stations in certain major markets.[1] Specifically, the complaint charged that Channel 3 in Philadelphia [2] had been so obtained from Westinghouse in 1956 in exchange for NBC's Cleveland station and $3,000,000 in cash.

The 1956 exchange had been approved by the Federal Communications Commission after an extensive investigation. *National Broadcasting Company, Inc.*, 13 Pike & Fischer RR 374. NBC and Westinghouse had both sought that approval.[3]

The effect of the Commission's approval as a bar to the antitrust action came before this Court in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). This Court held the suit not barred.

Thereafter, following prolonged negotiations, the litigation was terminated by a Consent Decree approved by

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1. Appellant's description of the complaint in its Jurisdictional Statement (p. 2) is erroneous. As stated by the Government, the complaint did not challenge the "acquisition or ownership of stations as such" by RCA or NBC. Appendix A, *infra*, p. 21.

2. The repeated references by Westinghouse to the Philadelphia station as WPTZ are difficult to understand. The Philadelphia station has not been designated by the call letters WPTZ since the 1956 exchange. For the last 4 years, it has been designated WRCV-TV. To avoid the confusion thus created by appellant, the station is referred to herein as Channel 3.

3. See statement by the Chairman of the Commission that the Commission "must take them [Westinghouse] upon their word that the transfer was based upon the exercise of a prudent business judgment", 13 Pike & Fischer RR at 381. At no time has Westinghouse disavowed the approval it had sought, either in court or before the Commission.

the district court on September 22, 1959. The decree specifically provided that it was entered without trial or finding of fact on any issue, and that it did not constitute evidence or an admission with respect to any issue of law or fact. In presenting the Consent Decree to the district court the Department of Justice stated to the court that the decree was "in the public interest and fair and equitable to both sides".

Section IV(A) of the decree (Juris. Statement, Appendix B, pp. A-3 to A-11), enjoins NBC and RCA from coercing "any person" to sell a broadcast station by threatening to terminate or to refuse to enter into an NBC television network affiliation with any "other" television station "controlled by the same person". Section IV(B) enjoins NBC and RCA from acquiring any television station in eight named market areas, including Boston and San Francisco, unless prior written notice is given to the Department of Justice, affording the Government the opportunity to apply to the district court for a determination whether the consent of the other party to the acquisition was obtained by acts of NBC or RCA relating to the negotiations for the acquisition, which acts constituted an unreasonable restraint of trade or which constituted conduct barred by Section IV(A). If the Government were to apply to the district court for a determination, then the transaction could not be effected until the district court determined that the consent of the other party was not so obtained.

Section V of the Decree directs NBC to "sell, exchange or otherwise dispose of" Channel 3 by December 31, 1962. In the event the disposition is by exchange, the decree prescribes the same procedure as is provided by Section IV(B) for acquisitions.

Section VIII provides that the parties "and no one else" may apply to the district court for further orders or instructions.

Promptly after the entry of the Consent Decree, NBC in order to comply with the decree, undertook to dispose of Channel 3. It entered into an agreement with RKO General, Inc. ("RKO") to exchange NBC's television and radio stations for RKO's Boston stations. At the same time, NBC accepted an offer by RKO to purchase NBC's stations in Washington, D. C. for $11,500,000. Subsequently, NBC entered into an agreement to purchase a television station in San Francisco.

Pursuant to the provisions of the Consent Decree, NBC advised the Department of Justice of the Philadelphia-Boston exchange, first informally in December, 1959, later by formal written notice on April 8, 1960. NBC also advised the Department of the proposed sale of its Washington stations and of the proposed purchase of the San Francisco station (See Appendix A, *infra*, pp. 17-18).

The Department of Justice conducted an exhaustive investigation of these transactions.[4] In the course of this investigation, the claims and assertions by Westinghouse and others were specifically examined and considered.[5] The Department concluded that neither the facts disclosed by the investigation nor the theories presented in opposition

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4. The extensive nature of this investigation, of which the court below was apprised,—involving interviews of 42 persons from coast to coast and examination of all documents pertaining to the transactions—is described in a letter dated May 26, 1960 from the Acting Assistant Attorney General, Antitrust Division, Department of Justice, to the Chairman of the House Judiciary Committee. The letter is certified as part of the record on this Appeal and, for the convenience of the Court, it is attached hereto as Appendix A, *infra*, pp. 15-27.

5. Seven representatives of Westinghouse including its Board Chairman, its President and two Vice-Presidents were among the 48 persons interviewed by lawyers of the Antitrust Division of the Department of Justice.

to the proposed transactions disclosed any violation of the Consent Decree or the antitrust laws.[6]

The Department reported preliminarily to the district court on May 6, 1960, at which time it advised the court that it would probably not ask for any determination by the court with respect to the proposed transactions.

On May 9, 1960, the Department of Justice reported finally to the district court that the Government had concluded not to apply for any determination under the decree.[7]

On the same day, Westinghouse filed a motion for leave to intervene.[8] The essence of the motion was that, if NBC acquired a television station in Boston, the present affiliation contract of NBC and Westinghouse's Boston station would necessarily be terminated. This was generally alleged to violate the Consent Decree.

On June 3, 1960, the Government filed a memorandum with the district court opposing Westinghouse's motion for leave to intervene as a party, stating that:

> "* * * To the Government's view, the proffer of proof plus the theories presented in the joint memorandum [of Westinghouse and Chronicle] do not enlarge

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6. There is obviously no basis for Appellant's bald assertion of the "Government's failure to enforce the Judgment" or for its charge that the Government was derelict in its duty to the court (Juris. Statement, pp. 7, 12).

7. Thereafter, on June 3, 1960, NBC and RKO applied for Federal Communications Commission approval of the proposed transactions (FCC File Nos. BAL-3911, BALCT-122, BAL-3912, BALH-423, BALCT-123 and related dockets). The applications are currently pending before the Commission.

8. On the same date, The Chronicle Publishing Company filed a companion motion for leave to intervene but withdrew its motion on June 8, 1960 after the Government had filed its opposition thereto. Thereafter, The Chronicle Publishing Company filed a petition with the Federal Communications Commission opposing the proposed transactions. That action is presently pending (FCC Files Nos. BAL-3912, BALH-423, BALCT-123 and related dockets).

upon facts disclosed by our investigation or upon theories considered by the Government. Those facts and theories in our view do not disclose any violation either of the judgment or the antitrust laws and, therefore, do not provide us with a basis under the judgment for seeking Court determination of any such violation. * * *"[9]

Oral argument was heard on June 9, 1960. On June 27, 1960, the district court (Kirkpatrick, J.) denied the motion by Westinghouse to intervene. The Court held that intervention would be contrary to the specific terms of the Consent Decree by which jurisdiction was retained to enable the parties, "and no one else", to apply to the court for further instructions. The trial court then referred to the fact that the Government had "carefully investigated and reviewed all the facts and reached the conclusion" that the proposed transactions do not violate the decree. Finally, the Court said:

> "In this state of facts, even if I had discretion to allow the intervention, I would not do so. The Government is concerned with the public interest and is satisfied that the conduct which Westinghouse complains of is not against that interest."

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9. The Government's Memorandum is certified as part of the record on this appeal and, for the convenience of the Court, it is attached hereto as Appendix B, *infra*, pp. 28-29. Even if the point were relevant, the Memorandum makes plain that there is no warrant for Appellant's suggestion that the Government initially recognized a right in Westinghouse to intervene and then "shifted its position" (Juris. Statement, p. 8).

ARGUMENT.

The questions which this appeal seeks to have this Court consider are not substantial, and the appeal should be rejected.

A. The Question of Intervention as of Right Under Rule 24(a)(3).

Appellant contends for a right to intervene on the premise that under the Consent Decree, "[t]he District Court had within its control the disposition of" Channel 3. It thus seeks to bring its claim within the language of Rule 24(a)(3), F. R. C. P. th[redacted]ntervention as of right may be had

> "* * * when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court * * *".

Rule 24(a)(3) expressly contemplates in the first instance a situation in which the district court actually controls a property or has power to dispose of it or to order its disposal. 4 *Moore, Federal Practice*, Sec. 24.09, p. 58 (2d ed.). There is no such control or power in the district court under the Consent Decree in this case.

Under the terms of the Consent Decree, the duty of NBC and RCA to "sell, exchange or otherwise dispose of" Philadelphia Channel 3 by December 31, 1962 is absolute. If Channel 3 is sold or "otherwise dispose[d] of", the district court has no function whatever with respect to it. If the disposition of Channel 3 is by exchange, with another station, then the exchange must wait upon notice to the Department of Justice and the Department's determination whether to make an application to the court. If, as here, the Department decides that there is no basis for an application to the

court and therefore does not make one, the Consent Decree plainly contemplates that the exchange may go forward without the exercise by the court of any function whatever. If the Department does seek a determination, the court's sole function is to pass upon the question whether the kind of conduct prohibited by the decree was present. If that issue should be determined adversely to RCA and NBC, the effect would be that that particular exchange could not be completed. In any event, Channel 3 would still not be "subject to the control or disposition of" the court within the meaning of Rule 24(a)(3).

Even if it were to be assumed, arguendo, that Philadelphia Channel 3 is property within the control of the court, Westinghouse still has no standing to intervene as of right. The interest protected by Rule 24(a)(3) must be a "* * * direct and immediate interest in a res which is the subject of the suit * * *". *United States v. California Co-operative Canneries*, 279 U. S. 553, 556 (1928).[10] Further, the direct and immediate interest "must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." 4 *Moore, Federal Practice*, Sec. 24.09, 45 (2d ed.).

Here, Westinghouse plainly has no direct and immediate interest in Philadelphia Channel 3; indeed it has no interest whatever. Westinghouse expressly concedes that the interest it asserts is not in Philadelphia Channel 3 but in NBC's acquisition of a Boston station.

The Boston station is certainly not a res before the court. But even if it were, Westinghouse cannot show,

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10. This case was decided prior to the effective date of the Federal Rules. However, there has been no change in the requirement that there be an interest in property before the court. See *United States v. Columbia Gas & Electric Corp.*, 28 F. Supp. 116, 120 (D. Del. 1939), *cert. denied*, 309 U. S. 687 (1940); 4 *Moore, Federal Practice*, Secs. 24.05 and 24.09, 45 (2d ed.).

as to the Boston station, the required interest "known and protected by the law", 4 *Moore, supra.* The sole interest asserted by Westinghouse in NBC's proposed Boston acquisition is that if the Boston acquisition takes place, NBC will not require an affiliate in Boston. Hence, Westinghouse's present two-year NBC network affiliation in Boston would not be renewed at the expiration of its present term. But that interest is not a legally cognizable right. For under FCC regulation § 3.638(c), a network affiliation contract is limited to a two-year period and there is no right to a renewal. See *Federal Broadcasting System v. American Broadcasting Co.*, 167 F. 2d 349 (C. A. 2, 1948), *cert. denied*, 335 U. S. 821 (1948).

Thus, appellant clearly lacks standing to intervene as of right under Rule 24(a)(3) and its reliance on the *Sutphen Estates v. United States*, 342 U. S. 19 (1951), to show the contrary, is misplaced. That case involved a reorganization proceeding pursuant to a decree in which the property involved was clearly within the control and disposition of the court and in which the intervenor had the required direct interest. The court was obligated to determine the disposition to be made of the applicant's property and it was with respect to that property that the applicant, a lessor, claimed he would be adversely affected.

It might be noted that in *Sutphen* intervention was ultimately denied because the intervenor failed to show that he was adversely affected. In the instant case, in addition to the other failings in its position, Westinghouse has also failed to show that it will be adversely affected by the loss of the NBC network affiliation in Boston.[11]

B. The Question Posed by Westinghouse Whether the District Court "Had Not Surrendered Jurisdiction."

Section VIII of the Consent Decree accorded a right to the parties "and no one else" to apply to the district

11. Boston is a 3-station market, and since there are 3 networks each station necessarily has a network affiliation.

court for further orders or directions. Westinghouse seeks to draw attention from its lack of standing to intervene by asking this Court to consider, abstractly, the ruling of Judge Kirkpatrick rejecting Westinghouse's motion on the ground, inter alia, of the limitations of Section VIII. It is said that an important question is thus presented as to the "court's power to act independently of the wishes of one of the parties" (Juris. Statement, page 13). We submit that no novel or important question is presented.

Appellant's argument is based on this Court's observation in *United States v. Swift*, 286 U. S. 106 (1932) that a court possesses inherent power to modify its decree in adaptation to changed circumstances.

Swift involved an application by parties for relief from a portion of a Consent Decree on the ground that the restraint, in view of changed circumstances, had become oppressive. The decree had retained jurisdiction for taking such further action "as may become necessary" and for "entertaining at any time hereafter any application which the parties may make". 286 U. S. at pp. 109-110. The court rejected the contention that the decree could not in any manner be changed. After noting that "Power to modify the decree was reserved by its very terms", the court stated that "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong" (286 U. S. at pp. 114-115). From this, Westinghouse contends for the general proposition that the district court in the circumstances of this case must ignore the terms of the Consent Decree for the purpose of permitting an application to intervene (Juris. Statement, p. 10).

We suggest that the *Swift* case has no direct bearing on the question which Westinghouse presents. The application there was to modify the decree and was made by parties subject to it. The decree had specifically provided

for such applications. The Court's recognition of the right of a party to obtain modification either under the decree or under the Court's equity power to modify the injunctive provisions of a decree where hardship is allegedly imposed by it, does not sustain Westinghouse's attempt here, not to modify, but to intervene in the teeth of a Consent Decree provision on retained jurisdiction.

Provisions such as that contained in Section VIII, leaving power in the parties "and no one else" to apply to the court under consent decrees, have been enforced according to their terms. *United States v. Loew's Inc.*, 136 F. Supp. 13 (S. D. N. Y. 1955); *United States v. Loew's Inc.*, 20 F. R. D. 423 (S. D. N. Y. 1957). These decisions recognize that jurisdiction in an antitrust suit is exhausted by a decree accomplishing the intended purpose; and that, if jurisdiction be specifically retained in the decree, it can only exist within the limitations of the retention provision. The reasoning applies here. The Consent Decree was accepted by NBC as a termination of the litigation. A carefully delineated power to apply to the court under certain expressed circumstances existed in the Department under the agreed upon administrative machinery of the decree. Beyond this, the Consent Decree was final.

The decisions in the *Loew's* cases are in accord with this Court's approach to the relationship between consent decree provisions and petitions to intervene in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502 (1941). There, the district court had denied as a matter of discretion an application for leave to intervene by a non-party. The Consent Decree specifically provided that a protected non-party could, upon application, become a party to enforce rights. This Court reversed the district court, holding that the terms of the Consent Decree controlled. We accordingly suggest that Judge Kirkpatrick's view as to the effect of Section VIII is correct. But the question is abstract in this

case. Questions as to the relationship between intervention and the provisions of a consent decree need not be reached where, as here, the person seeking to raise the question lacks standing to intervene under any part of Rule 24, F. R. C. P. (see *supra*, pp. 7-9; *infra*, pp. 12-13) and cannot raise the issue.

C. The Question of the District Court's Discretion Under Rule 24(b).

Westinghouse attacks the refusal of the district court to permit it to intervene, stating that the district court held that, in view of the Government's opposition, "* * * the Court would not as a matter of law exercise its discretion * * *" (Juris. Statement, p. 12). Having thus characterized the district court holding, appellant then charges that "* * * nobody presented any facts to the Court. The Government refused to act and, by opposing intervention, effectively blocked any examination by the District Court of the issues as to defendants' compliance with the Judgment" (Juris. Statement, p. 12).

Westinghouse is incorrect in both phases of this argument. The court below did not decline to exercise its discretion "as a matter of law". It is also untrue that "nobody" presented any facts to the court". On the contrary, the Government conducted an extensive investigation of the proposed exchange and reported its investigation to the court. See Appendix A, *infra*, But, again, these questions need not be reached since Westinghouse cannot qualify under Rule 24(b), F. R. C. P., the rule on permissive intervention to which this phase of appellant's argument is directed.

Rule 24(b) permits intervention where "an applicant's claim or defense and the main action have a question of law or fact in common".

It may well be doubted whether there is any pending "main action" in the court below in which intervention could

be allowed. "An existing suit within the court's jurisdiction is a prerequisite" of intervention. *Hofheimer v. McIntee*, 179 F. 2d 789 (C. A. 7, 1950). Here the final decree was entered in September, 1959, and the action was never opened by the Government under Section (V)(2).

However, even if, arguendo, the exchange were to be considered a pending "main action", appellant nonetheless fails to present the required common question.

The exchange is prohibited only where the consent to the exchange results from NBC's use of its affiliation power against a station owner in one market to compel a transfer from that owner to NBC in another market or where the consent to such exchange is effected by conduct relating to the exchange which conduct is in restraint of trade.

Appellant makes no claim that the consent of RKO to the proposed Philadelphia-Boston exchange was coerced by NBC threats. Appellant complains that, as a result of the proposed exchange, it will lose its NBC network affiliation in Boston.[12] That raises an issue entirely foreign to the terms of the decree relevant to the exchange and, indeed, entirely foreign to those initially embraced by the antitrust suit. On other occasions, similar attempts to intervene have been rejected. See *United States v. Bearing Distributors Co.*, 18 F. R. D. 228 (W. D. Mo. 1955) (opinion by Judge, now Mr. Justice Whittaker); *United States v. Bendix Home Appliances, Inc.*, 10 F. R. D. 73, 76, 77 (S. D. N. Y. 1949); *United States v. ASCAP*, 11 F. R. D. 511, 513 (S. D. N. Y. 1951).

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12. Denial of intervention has not left appellant without access to a forum. After the district court denied Westinghouse's motion for leave to intervene, Westinghouse filed a petition with the Federal Communications Commission, which is almost identical with the motion. This petition, opposing the Philadelphia-Boston exchange between NBC and RKO, is presently pending (FCC File Nos. BAL-3912, BALH-423, BALCT-123 and related dockets).

CONCLUSION.

For the reasons set forth above, the present appeal presents no substantial question for the decision of this Court, and the appeal from the decision of the district court should be dismissed, or in the alternative the decision should be affirmed.

Respectfully submitted,

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November 18, 1960

APPENDIX A.

DEPARTMENT OF JUSTICE
Washington,

May 26, 1960

Honorable Emanuel Celler
House of Representatives
Washington 25, D. C.

My dear Congressman Celler:

This responds to your telegram, dated May 10, and received by me May 11, 1960. There you state that you are "profoundly disturbed by" this Department's "failure to object in the Federal District Court of Philadelphia to the plan of National Broadcasting Company and Radio Corporation of America to acquire television stations in Boston and San Francisco". Such "failure", your wire goes on, "makes a nullity of the decree or demonstrates that the decree is worthless". In this light, you request an "immediate report . . . concerning all facets of this matter".

In response, this Department did not move to block these acquisitions because, after the most thorough investigation and study of both transactions, no one who had worked on the case or the decree found any reasonable basis for contending that "acts or conduct of NBC or RCA relating . . . to the negotiation for the proposed acquisition" had transgressed the Court's decree in *United States v. Radio Corporation of America and National Broadcasting Company, Inc.* (Civil No. 21,743, E. D. Pa. 1956). Amplifying the bases for this conclusion, this "report", as per your request, (1) sketches the decree and the proceeding which gave it rise; (2) describes this Department's investigation under the decree of NBC's proposed Boston and San Francisco acquisitions; and (3) analyzes, in light

of that investigation, the grounds for this Department's judgment that the proposed acquisitions would not run afoul of the decree.

I.

By complaint filed December 4, 1956, the United States charged RCA and NBC with combining or conspiring to obtain VHF television stations in five of the eight primary markets by the unlawful use of NBC's power to grant to, or withhold from, non-network station owners, NBC network affiliation.[1] The "combination or conspiracy" alleged was "in part" "effectuated", in the complaint's words, by RCA's and NBC's "depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market . . . ." And all the "means" by which this plan was carried out, subparagraphs (a), (b) and (c) of complaint paragraph 20 allege, involved use of NBC's affiliation power in *one* market to obtain an advantage in *another*.

To remedy the violations, the complaint prayed for "such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate." Spelling out those "assets" referred to in the complaint's prayer, the United States, by answer to interrogatories (filed April 30, 1957), specified only "Divestiture of WRCV-TV and WRCV, Philadelphia, Pennsylvania, by sale to a non-network purchaser." Relief addressed to NBC's dual role as program source and national spot representative was also sought.

Tracking closely relief specified in the complaint's prayer, Paragraph V of the Final Judgment, entered September 22, 1959, "ordered and directed" RCA and NBC

1. To establish the existence of an unlawful conspiracy at trial, the Government planned to show the common design of RCA and NBC for station ownership, prove that the activities directed against Westinghouse in connection with the Philadelphia transaction were unlawful, and thus prove that the unlawful activities in Philadelphia had rendered the common design illegal.

"on or before December 31, 1962, to sell, exchange or otherwise dispose of all right, title and interest in WRCV-TV and WRCV to a person or persons not controlled directly or indirectly by either defendant . . . ."[2] The disposition of Philadelphia and the acquisition by NBC of a station in any of the remaining seven primary television markets in the country are made subject to notice to the Government and possible Court determination under the provisions of subparagraphs (1) and (2) of Sections IV(B) and V.[3] The Court's jurisdiction in the event of a determination pursuant to these provisions of the decree is directed to "acts or conduct of NBC or RCA relating in any way to the negotiations" preceding any transfer of stations within these decree sections. By way of additional relief, Paragraph IV(C) limited NBC's "Undertaking the national spot representation of any television broadcast station" other than those represented by NBC at the decree's entry.

II.

The decree procedures and standards governing NBC's acquisition, via exchange or otherwise, of any television station in any of the seven primary television markets, delimit this Department's responsibility vis a vis NBC's proposed Boston and San Francisco purchases. In this context then, just how did this Department proceed to discharge its responsibility?

On April 8, 1960, NBC counsel, as per decree Paragraphs IV and V, gave formal written notice of the proposed acquisition. Some 3½ months before, however, NBC counsel informally notified the Department that a tentative

2. Paragraph V prohibits NBC and RCA "from acquiring any ownership interest in any television broadcast station in the Philadelphia market area" for a minimum of ten years.

3. Paragraph IV(A), incorporated by reference in Paragraph V, enjoined defendants from using the network affiliation power in one market to obtain station properties in another. And both Paragraphs IV and V subject, in addition, such acquisitions to "an unreasonable restraint of trade" test.

agreement had been reached for an exchange of NBC's Philadelphia stations for RKO General's Boston stations, and for the acquisition of NBC's Washington station by RKO General for $11,500,000. We were also informed at that time (in mid-December 1959) that negotiations had been undertaken for the acquisition by NBC of a station in San Francisco. Regarding both transactions, we were told that no formal agreements had yet been reached.

About one month later, on January 15, 1960, we were advised that NBC and RKO General had filed with the Federal Communications Commission a tentative letter agreement embodying the transactions with RKO General already described. And, on January 29, 1960, the Department was informally notified by NBC counsel that an understanding had been reached by NBC for the purchase of KTVU, San Francisco.

As soon as the agreements were finalized, our investigation began. In the course of that investigation interviews were conducted with some 48 persons, as detailed in the attached Appendix. In addition, documents were obtained from the principals involved in the transactions and from a number of the persons interviewed. Reinterviews of key persons from NBC and RKO General were conducted under oath.

III.

This extensive investigation just described was molded to probe the possible validity of (among others) the following theories of Judgment violation: (1) The NBC negotiations with RKO General as constituting either a restraint of trade directed against competitors of NBC and RKO General or an abuse of NBC's network power cognizable under the decree; (2) The negotiations in San Francisco as a restraint of trade; and (3) Persistence of the RCA-NBC conspiracy alleged in the Government's 1956 complaint.

(1) *The NBC negotiations with RKO General.* Fully explored was any possible use by either NBC or RKO General of the prior connection between RKO General and KTVU to obtain KTVU for NBC. The facts disclosed by our investigation showed no present nor prior connection between RKO General and KTVU from which it could be inferred that RKO General possessed some sort of leverage with respect to KTVU. We also considered whether a straight tie-in theory might be applied to the negotiations between NBC and RKO General. For, in the agreement between NBC and RKO General the latter conditioned its willingness to relinquish Boston upon NBC's agreement to sell Washington. NBC, on the other hand, conditioned its agreement to give up Washington on its ability to obtain a suitable replacement market. Thus, it was argued, the deal tied together several television markets in one transaction thereby excluding other prospective purchasers who might have desired to obtain any one of the stations in Philadelphia, Washington, Boston or San Francisco. Evidence obtained, however, showed no use of economic leverage by NBC. Without such economic leverage, any tie-in theory seemed inapplicable.

Since RKO General was a multiple station owner, every effort was made to determine whether NBC had abused its affiliation power, as alleged in the complaint with respect to Westinghouse, to obtain an advantage over RKO General. However, no facts were developed showing the use of the affiliation power by NBC as a negotiating weapon in its dealings with RKO General. As a matter of fact, the evidence obtained seems more consistent with the proposition that RKO General occupied a stronger bargaining position than NBC.

(2) *The NBC negotiations with KRON.* Having in mind the dual jurisdiction of the Court under the decree, on the one hand, and the FCC with regard to matters of television ownership generally, on the other, the negotia-

tions between NBC and KRON were carefully scrutinized for any *acts or conduct relating to the negotiations* showing abuse of the network affiliation power. From facts obtained, we concluded that acts or conduct of NBC amounting to a restraint of trade cognizable under the decree could not be established.

(3) *Persistence of the RCA-NBC conspiracy alleged in the Government's 1956 complaint.* The Division gave extensive consideration to the possibility that the instant transactions constituted the final stage of the RCA-NBC conspiracy alleged in the complaint. Recall that the initial conspiracy depended for its illegality upon the unlawful means, not found here, which were used by NBC to gain advantage in one market by use of the affiliation power with respect to another. In light of the presumption that the conspiracy had ended with the entry of the Final Judgment, we thought it highly unlikely that the Court would find this initial conspiracy between NBC and RCA to have been resurrected or to have survived, solely on the ground that one end sought by the conspirators had been achieved with the acquisition by NBC of stations in Boston and San Francisco.

We also considered whether NBC, in negotiations with Westinghouse, had attempted to exercise its affiliation power to force Westinghouse to give up Boston. Our investigation did not develop facts to support an allegation that Westinghouse had been the subject of *acts or conduct* by NBC from which it could be established that the network power of NBC had been used with respect to one market in order to gain an economic advantage in another.

True, the loss of NBC affiliation by Westinghouse and KRON may result in economic injury to their broadcasting operations in Boston and San Francisco. Such injury, however, is attributable to exercise by NBC of its option to terminate the affiliation relationship rather than to acts or conduct of RCA or NBC improper under the decree.

Mindful, however, of the impact of the proposed acquisitions upon Westinghouse and KROX, the Division informed Judge Kirkpatrick that NBC had agreed "not to file an application before the Federal Communications Commission—which they would have to do after we let our thirty day period run, in order to get approval of the transactions involved—until Monday, May 16, so that the Court could hear any persons, if there were such", who might petition the Court during the period. The Government sought by this action to avoid any possible claim that NBC's filing for approval with the FCC (upon the expiration of the thirty day notice period specified in the decree) would bar as untimely petitions by Westinghouse and KROX.[4]

Since our investigation did not show violation of the Final Judgment, the result may well be that complainants are left to plead their cause in other judicial forums or before the FCC. Such course is, I feel, consistent with dual antitrust and FCC jurisdiction and with the Supreme Court's ruling in *United States v. RCA and NBC*. Neither that decision nor the judgment itself intrudes upon powers or responsibilities of the FCC in its application of the statutory standard of "public interest, convenience and necessity." In short, our decision not to move in Court here was based, as it had to be, solely on application to facts unearthed of the decree's precise standards, tailored to remedy a particular abuse. Thus viewed, such decision reads not on the broad "public interest" issue to be considered by the FCC.

To sum up, the original complaint was concerned with the allegedly unlawful acquisition of the Westinghouse Philadelphia stations, not with NBC's acquisition or ownership of stations as such. Therefore, the complaint sought and the decree achieved divestiture of these stations. By the same token, neither complaint nor decree sought to

4. As you know, Westinghouse and KROX filed motions for leave to intervene with the Court on May 9, 1960.

block NBC from selling its Washington stations or from acquiring stations elsewhere. After careful investigation and review of the facts, we concluded that NBC's proposed Boston and San Francisco acquisitions did not violate the decree. Hence, no request by the Department was made for Court determination under the decree.

I appreciate your long standing interest in problems of antitrust and television. This interest has been reflected in numerous hearings and inquiries by your Antitrust Subcommittee. It is in this light that we burden you with this lengthy report.

Please do not hesitate to call upon us for any further clarification that you may deem appropriate.

Sincerely yours,

/s/ ROBERT A. BICKS,
Robert A. Bicks,
Acting Assistant Attorney General
Antitrust Division.

APPENDIX [of Department of Justice].

The following persons were interviewed by Mr. Bernard M. Hollander of the Antitrust Division, in connection with this Division's Judgment investigation in *United States v. RCA and NBC*, between January 21, 1960 and April 27, 1960 at the indicated locations. In virtually every instance, Mr. Hollander was accompanied by another member of the Division staff from either our Washington or San Francisco Office:

RKO General, Inc.

January 21, 1960—Thomas F. O'Neil, Pres., New York, N. Y.
—John B. Poor, Vice-Pres., New York, N. Y.

March 18, 1960 —Wilton Gunsendorfer, ex-Management Consultant, Los Angeles, Calif.

March 31, 1960 —George R. Ruppel, ex-Vice-Pres. & Treas., New York, N. Y.
—Arnold Kaufman, ex-Broadcasting Div. Dir. for Boston and Washington, New York, N. Y.

April 5, 1960 —W. Theodore Pierson, Counsel, Washington, D. C.

Station KRON-TV

March 14, 1960 —Sheldon G. Cooper, San Francisco, Calif.
—Charles Thieriot, Pres., San Francisco, Calif.
—Harold See, Gen. Mgr., San Francisco, Calif.
—Lester Spillane, Counsel, San Francisco, Calif.

Station KTVU

March 15-16, 1960—William D. Pabst, Gen. Mgr. and part owner, Oakland, Calif.
—Ward Ingrim, Sales Mgr. and part owner, Oakland, Calif.

March 16, 1960 —Stoddard F. Johnston, Salesman and part owner, Oakland, Calif.

March 17, 1960 —Willet H. Brown, part owner, Los Angeles, Calif.
—Harry R. Lubcke, part owner, Los Angeles, Calif.
—Edwin W. Pauley, part owner, Los Angeles, Calif.
—Orris R. Hedges, Counsel for Pauley, Los Angeles, Calif.
—Claude L. Cameron, Asst. to Pauley, Los Angeles, Calif.

March 18, 1960 —John A. Kennedy (telephone interview), La Jolla, Calif.

April 11, 1960 —Andrew G. Haley, ex-Counsel for Pauley, Washington, D. C.

Westinghouse Broadcasting Company

February 9, 1960—Donald McGannon, Pres., Washington, D. C.
—Joseph Baudino, Vice-Pres., Washington, D. C.
—John Steen, Counsel, Washington, D. C.

March 7, 1960 —George Turner, Counsel, Washington, D. C.

March 14, 1960 —Philip G. Laskey, Vice-Pres., West Coast Operations, San Francisco, Calif.

March 29, 1960 —E. V. Huggins, Board Chairman, Washington, D. C.
—George Turner, Counsel, Washington, D. C.

American Broadcasting Company

March 30, 1960 —John H. Mitchell, Vice-Pres. and Gen. Mgr. KGO-TV, San Francisco, Calif. (Interviewed by Gilbery Pavlovsky, San Francisco Office)

April 1, 1960 —Oliver Treyz, Pres., ABC Television Network, New York, N. Y.
—Julius Barnathan, Vice-Pres., Station Relations, New York, N. Y.
—Robert Coe, Mgr., Station Relations, New York, N. Y.

Columbia Broadcasting System, Inc.

April 1, 1960 —Dr. Frank Stanton, Pres., New York, N. Y.
—William B. Lodge, Vice-Pres., Station Relations, New York, N. Y.

Station Brokers

March 15, 1960 —Lindsay Spight, Television Communications Inc., San Francisco, Calif.

March 17, 1960 —Colin Selph, Blackburn & Company, Los Angeles, Calif.

April 4, 1960 —W. R. Twining, San Francisco, Calif. (Interviewed by Mr. Pavlovsky)

April 27, 1960 —Herbert Scheftel, New York, N. Y.
—Alfred Burg, New York, N. Y.

In connection with the above interviews, relevant documents were furnished to the Department by RKO General, KRON, KTVU, CBS, Edwin W. Pauley, Willet H. Brown, Milton Gunsenderfer, and W. Theodore Pierson.

Beyond interviews with persons other than defendants' officers and employees, NBC and RCA were requested by letter on March 3, 1960 to provide the Department with all writings relating in any way to (1) the NBC-RKO General transactions, and (2) the San Francisco negotiations. On March 21, 1960, NBC and RCA forwarded the documents requested. On April 11, 1960, the Division asked NBC and RCA by letter to make further search of certain of their files. On April 19, 1960, the Division notified NBC and RCA in writing of its intention to interview certain persons pursuant to paragraph VII of the Judgment. The following persons were then interviewed by Messrs. Bernard M. Hollander and Raymond M. Carlson of the Division staff at the indicated locations:

National Broadcasting Company, Inc.

April 26, 1960—P. A. Sugg, Exec. Vice-Pres., Owned and Operated Stations and Spot Sales, New York, N. Y.
—David C. Adams, Sr. Exec. Vice-Pres., New York, N. Y.
—Thomas E. Ervin, Vice-Pres. and Gen. Atty., New York, N. Y.

April 27, 1960—Robert E. Kintner, Pres., New York, N. Y.
—Robert W. Sarnoff, Board Chairman, New York, N. Y.
—Harry Bannister, Vice-Pres., Station Relations, New York, N. Y.

Radio Corporation of America

April 27, 1960—John L. Burns, Pres., New York, N. Y.

On May 5, 1960, the Division requested that RKO General produce all documents of that company relating to the Boston-Philadelphia-Washington transaction and arranged for interview under oath with the key persons at RKO General and NBC involved in that transaction. Messrs. Hollander and Carlson examined the documents of RKO General on May 6, 1960 and interviewed Thomas F. O'Neil and John B. Poor for the second time, this time under oath. The following day, May 7, 1960, P. A. Sugg, NBC Vice-President, again was interviewed, this time under oath.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA, *Plaintiff*, v. RADIO CORPORATION OF AMERICA and NATIONAL BROADCASTING COMPANY, INC., *Defendants.*	Civil Action No. 21743.

MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTIONS OF CHRONICLE PUBLISHING COMPANY AND WESTINGHOUSE BROADCASTING COMPANY FOR LEAVE TO INTERVENE.

Plaintiff, United States of America, takes the following position with regard to the motions filed herein by Chronicle Publishing Company and Westinghouse Broadcasting Company for leave to intervene under Rule 24 of the Federal Rules of Civil Procedure:

1. We oppose the granting of the motions to intervene. Movants have misconstrued our statement to the Court on May 6, 1960, that we would not oppose their being heard, to mean that we would support their right to be heard as parties. We believe that the Court should follow the numerous precedents and deny movants leave to intervene as parties.

2. We do, however, urge the Court, in its discretion, to hear movants, but solely on the question whether their

proffer of proof and theories warrant this Court directing the Government to submit the matter now for a determination under the judgment. To the Government's view, the proffer of proof plus the theories presented in the joint memorandum do not enlarge upon facts disclosed by our investigation or upon theories considered by the Government. Those facts and theories in our view do not disclose any violation either of the judgment or the antitrust laws and, therefore, do not provide us with a basis under the judgment for seeking Court determination of any such violation. However, this decree is a judgment of this Court. And the Court might find it helpful, considering whether its judgment has been transgressed, to hear views of the would-be intervenors.

Respectfully submitted,

/s/ BERNARD M. HOLLANDER,
Bernard M. Hollander,

/s/ RAYMOND M. CARLSON,
Raymond M. Carlson,
Attorneys
United States Department of Justice,
Washington, D. C.,

Dated: June 3, 1960